84-158

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ROCKY B. FISHERIES, INC.,
an Oregon Corporation,
JOHNNIE BROWN and DAVID BROWN,
Appellants,

v.

NORTH BEND FABRICATION & MACHINE, INC.,
an Oregon Corporation;
JOHN DUDREY with his law firm partners
FLOYD A. FREDRICKSON, LLOYD W.
WEISENSEE, PETER C. McCORD and JAY M.
FOUNTAIN; LAWRENCE F. FINNERAN with
his law firm partners JERRY O. LESAN and
KIRK JOHANSEN,
Appellees.

ON APPEAL FROM THE
OREGON COURT OF APPEALS

APPENDIX TO JURISDICTIONAL STATEMENT

JOAN L. VOLPERT*
JOHN L. LANGSLET
2908 First Interstate Tower
Portland, Oregon 97201
Telephone: (503) 224-3113
Counsel for Appellants
* Counsel of Record

7/20/84

STEVENS-NESS LAW PUB. CO., PORTLAND, OR. 97204 7-84

APPENDIX INDEX

Appendix

		Page(s)
A.	Opinion of Oregon Court of Appeals (66 Or. App. 625, 676 P.2d 319 (1984)) ...	A-1
B.	Denial of Petition for Review by Oregon Supreme Court (297 Or. 82 (1984)) ...	A-38
C.	Order of Coos County Circuit Court Judge Richard L. Barron sitting by designation in Multnomah County Circuit Court, dated June 14, 1982 ..	A-39
D.	Judgment of Coos County Circuit Court Judge Richard L. Barron sitting by designation in Multnomah County Circuit Court, dated June 14, 1982 ..	A-44
E.	Notice of Appeal	A-47
F.	Statutes Involved	A-50
	Or. Rev. Stat. 783.010 to 783.170	A-50
	Or. Rev. Stat. 29.020 to 29.075 (now Or. R. Civ. P. 81-85)	A-55
	Or. R. Civ. P. 83-84	A-64

APPENDIX

Appendix A

Opinion of Oregon Court of Appeals

No. CA A25230

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ROCKY B. FISHERIES, INC. et al,
Appellants,

v.

NORTH BEND FABRICATION & MACHINE, INC. et al,
Respondents.

Appeal from Circuit Court, Multnomah County.

Richard L. Barron, Judge.

Argued and submitted July 8, 1983.

Barbara J. Gazeley, Portland, argued the cause for appellants. With her on the briefs were John L. Langslet and Martin, Bischoff, Templeton, Biggs & Ericsson, Portland.

J. P. Graff, Portland, argued the cause for respondents. With him on the brief was Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P.J.

Affirmed.

Filed January 25, 1984

BUTTLER, P.J.

This action at law for damages arose out of the in rem seizure of a fishing vessel, the Rocky B, pursuant to ORS 783.010 et seq. Plaintiffs contend that defendants are liable under 42 USC § 1983, because the seizure was accomplished without due process of law, and are also liable for failure to comply with the requirements for issuance of provisional process specified in ORS 29.020 et seq (now codified in ORCP 81-85). They also seek recovery under theories of conversion, abuse of process and interference with contractual relations. The trial court granted defendant North Bend's motion for summary judgment

and the individual defendants' motion to dismiss; plaintiffs appeal from the resulting judgment dismissing all claims except one, which was added as a separate claim after the court had ruled on the motions.[1]

In May, 1979, plaintiffs Brown, now the sole shareholders of plaintiff Rocky B. Fisheries, Inc., began construction of a fishing vessel, the Rocky B. Construction was financed by Southern Oregon Production Credit Association (PCA), which secured its loan of more than $427,000 with what plaintiffs characterize as

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[1]The remaining claim alleges that the seizure of the vessel was illegal, because the Oregon court lacked jurisdiction and that jurisdiction vested exclusively in the federal court. The judgment, pursuant to ORCP 67B, articulates reasons for determining that there is no just reason for delay.

"preferred ship's mortgages." Defendant North Bend supplied services and materials on an open account for the construction, fitting, furnishing and equipping of the vessel. An outstanding balance of $5,410.04 was due when North Bend, through its attorneys, defendants Finneran and Dudrey, claimed a nonmaritime lien on the vessel in that amount pursuant to ORS 743.010(2).

On August 1, 1980, North Bend filed an action against the Rocky B, seeking a judgment against it for the balance due, and moved for an order authorizing the arrest of the Rocky B. On August 5, 1980, after requiring North Bend to post a bond, a circuit court judge ordered the clerk of the court to issue a warrant for the seizure of the vessel. The warrant was issued by the clerk, and the vessel

was seized by the sheriff. Plaintiffs learned of the seizure immediately and demanded that defendants release it. Because the seizure of the vessel constituted a default on the mortgage, PCA commenced an action in federal district court to foreclose its mortgage. The marshal, acting pursuant to an order of that court, seized the vessel and currently holds it under arrest.

Under ORS 783.010, every boat or vessel used[2] in the waters of, or

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[2]To the extent that ORS ch 783 purports to authorize state court actions with respect to maritime liens, it conflicts with the exclusive admiralty jurisdiction of the United States District Courts. Therefore, in The Victorian, 24 Or 121, 32 P 1040 (1893), the Supreme Court construed the provisions of ORS ch 783 to apply only to nonmaritime liens, i.e., liens with respect to labor and materials used in the original construction of ships.

constructed in, the state is liable and subject to a lien, so far as relevant:

> "(1) For wages due to persons employed, for work done or services rendered on board such boat or vessel.
>
> "(2) For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors or subcontractors of such owner, or with any person having them employed to construct, repair or launch such boat or vessel, on account of labor done or materials furnished by mechanics, tradesmen or others in the building, repairing, fitting and furnishing or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of premiums for insurance placed on or with respect to such boat or vessel, or on account of launchways constructed for the launching of such boat or vessel."

Under ORS 783.030 and 783.040, a creditor claiming a lien under ORS 783.010 may commence an in rem state court action directly against a vessel by filing a complaint setting forth his demand in all its particulars in the cir-

cuit court of the county in which the vessel is located. ORS 783.050 provides that when the complaint is filed, the clerk of the court shall issue a warrant commanding the sheriff to seize the vessel named in the complaint. Seizure of the vessel under that statutory procedure is a prerequisite to the perfection of a lien under ORS 783.010. Paddack v. Rasmussen, 294 Or 599, 604, 660 P2d 677 (1983).

On return of the warrant for the arrest of the vessel, "proceedings shall be had in circuit court against the boat or vessel seized, in the same manner as if the action had been commenced against the person on whose account the demand accured." ORS 783.060. The master, owner, agent or consignee of the vessel may appear and answer the complaint, ORS

783.070, but if no appearance is made, the plaintiff may obtain a default judgment against the vessel, which is the defendant. ORS 783.080. ORS 783.090 provides that the master or other interested person may have the vessel released prior to adjudication of the underlying claim by entering into an undertaking in favor of the plaintiff, with sufficient security to be approved by the judge or clerk of the court.

Plaintiffs contend that the prejudgment seizure of the Rocky B under chapter 783 violated their due process rights under the Fourteenth Amendment to the United States Constitution, giving rise to a claim under 42 USC § 1983. Their catalog of perceived constitutional defects in chapter 783 is drawn from the deficiencies exposed in four Supreme

Court cases that dealt with the constitutionality of state laws governing the seizure of a debtor's property before judgment: Sniadach v. Family Finance Corp., 395 US 337, 89 S Ct 1820, 23 L Ed 2d 349 (1969); Fuentes v. Shevin, 407 US 67, 92 S Ct 1983, 32 L Ed 2d 556 (1972); Mitchell v. W. T. Grant Co., 416 US 600, 40 L Ed 2d 406, 94 S Ct 1895 (1974), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 US 601, 95 S Ct 719, 42 L Ed 2d 751 (1975).

In Sniadach v. Family Finance Corp., supra, the Court invalidated a Wisconsin garnishment statute which allowed a creditor, without prior notice or hearing, to attach the wages of a debtor pending the outcome of the creditor's claim. Similarily, in Fuentes v. Shevin, supra, the Court struck down Florida and Pennsyl-

vania prejudgment replevin procedures that allowed creditors to seize goods in which they claimed an interest without providing the debtor with prior notice or an opportunity to be heard. The general rule to be gleaned from these cases is that, except in "extraordinary situations," whenever an owner is to be deprived of the use of his property during the pendency of litigation, due process requires notice and opportunity for an early hearing before a judicial officer.

In Mitchell v. W. T. Grant Co., supra, and North Georgia Finishing, Inc. v. Di-Chem, Inc., supra, the Court expanded that rule by holding that official seizures without prior notice and hearing or other safeguards against mistake violate due process. Mitchell upheld a Louisiana sequestration statute

which provided for the judicial issuance of a writ on the ex parte application of a creditor who claimed an interest in the property to be sequestered. Although no notice or opportunity for hearing was required prior to the issuance of the writ, the statute afforded other safeguards by requiring: (1) a sworn affidavit showing the creditor's claim and the right to repossession; (2) issuance of a writ authorizing the seizure by a judge rather than a court clerk; (3) a bond sufficient to compensate the debtor for damages caused by a wrongful seizure, and (4) an opportunity for the debtor to seek "immediate" dissolution of the writ, which must be ordered unless the creditor "proves the grounds upon which the writ was issued." 416 US at 606. In North Georgia, the court relied mainly on

Mitchell in invalidating a Georgia garnishment statute which authorized a court clerk to issue a writ of impoundment based on an affidavit containing only conclusory allegations. The statute attacked in North Georgia had none of the "saving" characteristics emphasized in Mitchell.

Relying on those precedents, plaintiffs here claim that the seizure of the Rocky B was deficient in several respects: (1) no pre-seizure notice or hearing was afforded plaintiffs; (2) the complaint filed by defendants consisted of bare conclusory allegations unsupported by an affidavit containing facts to support the claim; (3) there was no meaningful judicial participation in the issuance of the writ; (4) no "extraordinary situation" existed which would justi-

fy summary seizure,[3] and (5) no oppor-

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[3] In Fuentes v. Shevin, supra, the Supreme Court outlined the "extraordinary situatins" exception:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, 401 US [371], at 379 [91 S Ct 780, at 786, 26 L Ed 2d 113]. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 US at 90-91. (Footnotes omitted.)

Several federal courts have relied on this exception in upholding maritime seizures. See, e.g., Merchant's National Bank v. Dredge General G. F. Gillespie, 663 F2d 1338 (5th Cir 1981); Central Soya

tunity for a post-seizure hearing was provided.

The question is whether that line of cases applies to a chapter 783 proceeding, where the purpose of the statutory scheme is to permit the perfection of a statutory lien against a specific vessel and where any judgment that may be entered is against that vessel only and may be collected, if at all, from the sale of the vessel. ORS 783.110. The situation presented is somewhat analogous to a construction lien claimed by a materialman who provides material to a contractor in the construction of a commercial building. The owner may have

Co., Inc. v. Cox Towing, 417 F Supp 658 (ND Miss 1976); Olyesha Pipeline Service Co. v. Bay Ridge, 509 F Supp 115 (D Ala 1981), appeal dismissed 703 F2d 381 (9th Cir 1983); Karl Senner, Inc. v. M/V Acodian Valor, 485 F Supp 287 (ED La 1980).

paid the contractor in full, but the contractor may not have paid the laborers or materialmen. Those unpaid suppliers are entitled to a lien against the building, even though they have no claim against the owners. The lien may be perfected by a filing within the time permitted by ORS 87.035, and no notice is required either before or after filing, although failure to give the post-filing notice specified in ORS 87.039 precludes the lien claimant from recovering costs and attorney fees.

It is true that filing a lien against real property is not quite as drastic as seizing a vessel. However, the filing of a lien constitutes a restraint on the alienation of the property and may cause irreparable harm to the owner; for that reason, the lien

expires six months after it is filed, unless an action is commenced to foreclose it. ORS 87.055. There is no filing procedure under chapter 783, the statutory lien being perfected only by seizure, which must be accomplished within one year after the cause of action has accrued.

The analogy is by no means complete, but it suggests that in the context of due process there may be a weighing of the rights of the parties to determine whose due process has been denied. Under chapter 783, as in maritime liens, the concept that the vessel, apart from its owner, has incurred a liability is fundamental in the context of the arrest or seizure of vessels. Merchant's National Bank v. Dredge General G. F. Gillespie,

663 F2d 1338, 1345 (5th Cir 1981).[4] In Cordrey v. Steamship "Bee," 102 Or 636, 651, 201 P 202 (1921), the court quoted from Keating v. Spink, 3 Ohio St 105, 62 AD 214 (1893):

> "This statute, then, as stated by the court in the Canal-Boat Huron v. Simmons, 11 Ohio [459, 461 (1842)], "treats the boat as a person, and makes it responsible in its own name for all debts contracted for its use, and for all injuries committed against persons or property on board, by her officers or crew." The liability is upon the craft--the proceeding is against the craft--and the judgment operates alone upon the craft. Its seizure is indispensable to the jurisdiction of the court, and its continued custody, unless released upon bond and security, indispensably necessary to the further proceedings, after final judgment."

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[4]Although federal cases ruling on the constitutionality of procedures employed in maritime seizures are not authoritative in the context of a non-maritime seizure, they delineate the historical and practical distinctions between admiralty and common law and, by analogy, aid in determining the due process required in the present context.

The doctrine of the ship's liability, apart from that of its owner, and the concept that the lien creates an interest in the vessel do not immunize the procedure from the constraints of due process. However, as the Supreme Court observed in Mitchell v. W. T. Grant Co., supra, 416 US 610:

> "* * * [The] requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' Due process of law guarantees 'no particular form of procedure; it protects substantial rights.' 'The very nature of due process negates any concept of inflexible procedures universally applicable to any imaginable situation.' (Citations omitted.)"

The fundamental requisites of due process are adequate notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 313-16, 70 S Ct 652, 94 L Ed 865 (1970). If the procedures provided by chapter 783

meet those fundamental requirements, they should be upheld. Although there is no statutory requirement that the owner of the vessel be given notice of its seizure, in Cordrey v. Steamship "Bee," supra, 102 Or at 650, the court said that "seizure of one's property is notice to him of an invasion of his rights, calling upon him to defend." It held that failure to require written notice did not offend due process. Despite the fact that notice by seizure has been criticized of late, it is particularly appropriate in the seizure of a seagoing vessel, the identity or whereabouts of whose owners may be unknown, or whose owners may be outside the jurisdiction.

As the court stated in Cordrey v. Steamship "Bee," supra, 102 Or at 653:

> "* * * In the case of a seagoing vessel especially, which is constantly in charge of a master or other representative of the owner, or of the owner himself, the mere taking is such an invasion of property rights as to notify the owner as a practical matter, that he must defend. * * *"

It is reasonable to assume that the master of a vessel will notify the owner or the owner's insurer in the event of seizure. We cannot say that the notice provided by chapter 783 is inadequate because it is not provided prior to the seizure of the vessel. There is no lien prior to seizure and, if prior notice were required, it would in many instances enable the owner to frustrate the perfection of the lien and its priority by putting out to sea or alienating the vessel. The lien provided by ORS 783.010 gives a lienor a sufficient interest in the vessel to detain it so that the lien can be

perfected and judicially enforced. For those reasons, we conclude that neither pre-seizure notice nor hearing is constitutionally required.

Plaintiffs challenge the statute's lack of a statutory provision for a prompt post-seizure hearing, but they ignore ORS 783.090. Although that section may not articulate the procedure to be followed as completely as we might desire, it expressly allows an owner, agent or consignee to secure the immediate release of a vessel by entering into "an undertaking in favor of plaintiff, with sufficient security, to be approved by the judge or clerk of the court in which the action is pending." We are bound to uphold the constitutionality of legislation when it is reasonably susceptible to an interpretation that will per-

mit it. City of Portland v. Welch, 229 Or 308, 316, 364 P2d 1009, 367 P2d 403 (1961). Just as the court in The Victorian, supra, n 2, limited the application of what is now ORS ch 783 to non-maritime liens in order to avoid conflict with the Congressionally mandated exclusive federal jurisdiction over maritime liens, we should construe ORS 783.090 to comport with due process requirements, if it is susceptible to such a construction.

It is clear that the statute permits the owner, after seizure, to request the judge to approve the security he must post in order to obtain the release of the vessel. Given that express statutory procedure, we construe the statute to permit the owner to obtain a post-seizure hearing to challenge the legality of the

seizure, the validity of the claim or the amount claimed in order to fix the amount of the undertaking necessary to release the vessel. Accordingly, the statutory scheme is not invalid on its face. Neither was it unconstitutionally applied in this case. Here, plaintiffs did not attempt to avail themselves of that procedure. Therefore, we hold that the provisions of ORS chapter 783 and the procedures employed in the seizure of the Rocky B did not violate plaintiffs' due process rights. The trial court did not err in dismissing plaintiffs' claim under 42 USC § 1983.[5]

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[5]42 USC § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be sub-

Plaintiffs also contend that the requirements for issuance of provisional process set forth in ORS 29.020 et seq (now codified in ORCP 81-85) apply to the seizure of a vessel pursuant to chapter 783 and that defendants are liable for failure to follow those procedures. As we stated in Huntington v. Coffee Associates, 43 Or App 595, 603 P2d 1183 (1979):

> "ORS 29.020 to 29.075 were enacted in 1973 in response to the U.S. Supreme Court decisions in Fuentes v. Shevin, 407 US 67, 92 S Ct 1983, 32 L Ed 2d 556 (1972), and Sniadach v. Family Finance Corp., 395 US 337, 89 S Ct 1820, 23 L Ed 2d 349 (1969), which invalidated statutory provisional remedies in many states, in-

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jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *"

> cluding Oregon, as not meeting the requirements of due process because they permitted prejudgment attachment, garnishment or repossession provisional processes without a prior hearing.
>
> "In adopting ORS 29.020 to 29.075, the legislature established procedural requirements for all types of provisional process, with respect to all of which judicial intervention is necessary and, except for extraordinary circumstances, notice and hearing are required. * * *"

ORS ch 783 provides a complete set of procedures whereby a creditor may acquire, perfect and enforce a lien in a narrowly defined and historically unique area of law. The Sniadach line of cases, in response to which ORS 29.020 et seq were enacted, are inapposite to the seizure of a vessel under ORS 783.030 et seq, where seizure is necessary both to perfect a creditor's interest in the property and to invoke the court's jurisdiction. Moreover, the provision for pre-

seizure notice and hearing mandated by Oregon's provisional process statutes might defeat a creditor's ability to perfect and enforce a statutory lien against the vessel by providing an opportunity for the vessel to abscond from the court's jurisdiction. Given those statutory purposes for the seizure of a vessel, the process does not appear to be provisional in the ordinary sense of that term any more than does the filing of a construction lien.[6] For these reasons,

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[6]Prejudgment seizures of property to which the requirements for provisional process apply are limited by the definition of "provisional process." Former ORS 29.020(5) (repealed by Or Laws 1981, ch 898, § 53) defined "provisional process" to mean:

> "[1] attachment under ORS 29.110 to 29.400, [2] garnishment under such attachment, [3] replevin or claim and delivery under ORS 29.080 to 29.095 or [4] any other legal or

we conclude that the procedures set forth in ORS 29.020 et seq are inapplicable to the seizure of a vessel pursuant to ORS 783.010 et seq.

Plaintiffs' reliance on Lent v. Robinson, 47 Or App 579, 615 P2d 338 (1980), is misplaced. In Lent, we indicated that the plaintiffs, who had

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> equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or restrain use or disposition of, property in which the defendant claims an interest." (Emphasis supplied.)

The defendant in an action under ORS 783.030 is the vessel, not its owners. The emphasized language in the quoted statute suggests that the legislature intended the requirements of provisional process to apply only to in personam or quasi in rem proceedings against a debtor, not to strictly in rem proceedings against property. We express no opinion as to the effect of those statutes when the owners of the vessel are parties defendant and a judgment is sought against them personally.

obtained a prejudgment attachment and garnishment, were required to comply with the 1973 statutory requirements for provisional process, even when the claimed purpose of the attachment was to obtain quasi in rem jurisdiction. The question presented in Lent was whether the trial court's order quashing the writ of attachment was appealable. We held that it was not, because the trial court was without authority to issue the writ in the first place. The plaintiffs contended that the court had authority, because it was necessary for the court's jurisdiction. The record revealed, however, that the defendant had been served by substituted service, sufficient to obtain jurisdiction over him, but not sufficient to give him the personal notice required by the provisional process statutes.

Former ORS 20.065(2) (repealed by Or Laws 1981, ch 898, § 53). The plaintiffs relied on the pre-1973 statutes authorizing prejudgment attachment without notice (former ORS 29.110, repealed by Or Laws 1981, ch 898, § 53), which had not been expressly repealed by the 1973 legislation. We concluded, however, that, because the 1973 legislation conflicted with the prior legislation, it controlled to the extent that it conflicted with the earlier statutory scheme. See Davis v. Wasco IED, 286 Or 261, 272, 593 P2d 1152 (1979). Attachment and garnishment are clearly provisional processes covered by the 1973 statutory scheme; seizure of a vessel to perfect a statutory lien is not. We find no conflict between the provisional process statutes and chapter 783.

Plaintiffs contend that the "wrongful" seizure of the Rocky B constituted conversion and that defendants are liable to plaintiffs for the full value of the vessel. Because we have concluded that the defendants were within their rights in seizing the vessel, plaintiffs have not stated a claim for conversion.

Plaintiffs further contend that defendants' conduct in causing the seizure of the Rocky B constituted an abuse of process. Abuse of process is the perversion of a legal procedure to accomplish an ulterior purpose when the procedure is commenced in proper form and with probable cause. Larsen v. Credit Bureau, 279 Or 405, 408, 568 P2d 657 (1977); Kelly v. McBarron, 258 Or 149, 154, 482 P2d 187 (1971). Dean Prosser identified the essential elements of the tort:

> "'* * * [F]irst, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. * * *' Prosser, Law of Torts 857, § 121 (1971). (Footnotes omitted.)" Quoted in Larson v. Credit Bureau, supra, 279 Or at 408.

Plaintiffs appear to argue that defendants asserted the priority of North Bend's lien over PCA's mortgage in order to coerce PCA to pay plaintiffs' indebtedness to North Bend. Taking those allegations as true, however, they fail to state a claim for abuse of process.

North Bend had the right to attempt to collect the amount owed it and had the right to assert and perfect its lien by seizing the vessel. It was also entitled to a judicial determination whether its lien was prior to that of PCA. If its lien was not prior to PCA's mortgage, there was no way it could "coerce" the latter into paying North Bend, unless PCA preferred to pay it rather than have the vessel sold subject to its mortgage. If, on the other hand, North Bend had priority, PCA would be required to pay off that lien in order to protect its junior lien. If threats by North Bend to foreclose constitute coercion, that is part of the process, not an abuse of it.

There is nothing unusual about holders of liens commencing foreclosure proceedings in the hope that they may per-

suade another lienor that may have priority so that the other lienor will buy them out. The commencement of such proceedings does not become an abuse of process merely because the initiator hopes to obtain a benefit short of a foreclosure sale. Restatement (Second) of Torts, 475, § 682, comment b (1977). It is absurd to say, then, that a lienor claiming priority has acted improperly in doing what the law requires to effectuate its rights--seizing the vessel and asserting its priority.

Although defendants are willing to "concede" that it might be an abuse of process if defendants had seized the vessel to acquire a lien they knew was inferior to PCA's and had falsely asserted priority in order to compel PCA to pay off plaintiffs' debt, plaintiffs have not

alleged that defendants asserted the priority of North Bend's lien in the knowledge or reasonable belief that it was inferior to that of PCA.[7]

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[7]In plaintiffs' third claim for relief, they assert:

> "In furtherance of defendants' improper purpose, defendants claimed an illegal and wrongful lien on the 'Rocky B' which defendants asserted was superior to the Preferred Ships Mortgage of PCA, which forced PCA to file its own foreclosure action on the 'Rocky B' in order to protect its interests. Further, defendants told PCA that they would harass and annoy it and plaintiffs with their wrongful lien claim until PCA paid the claimed debt, and would persist in their wrongful claim of lien even though they were told their lien was wrongful, and their procedures were improper. After PCA filed its foreclosure action, which foreclosure was solely and exclusively caused by defendants' wrongful seizure, defendants persisted in their claim of lien."

We have already concluded that the procedure whereby the lien was claimed was not wrongful or illegal. As asserted in this

Defendants' motions for dismissal and summary judgment on this claim were properly granted.

Under the terms of the mortgage between plaintiffs and PCA, the seizure of the Rocky B constituted an act of default. Plaintiffs allege that before the seizure of the vessel they and PCA had agreed that, although the first payment on the mortgage was due in October, 1980, PCA would not foreclose, but would allow plaintiffs to make payments from their profits in the 1980-81 fishing season, which commenced in December, 1980. Defendants' actions in causing the seizure of the Rocky B allegedly interfered

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context, we conclude that the words "wrongful and illegal" must refer to the status of the lien itself and not to the fact that defendants have asserted a superior lien.

with those agreements, to plaintiffs' detriment.

In order to state a claim for intentional interference with a business relationship, facts must be alleged that show an intentional interference with the plaintiff's business relationship, that the interference was for an improper purpose or was by improper means and that, as a result, the plaintiff was injured beyond the fact of the interference itself. Straube v. Larson, 287 Or 357, 361, 600 P2d 371 (1979); Erlandson v. Pullen, 45 Or App 467, 471, 608 P2d 1169 (1980).

Plaintiffs have failed to allege sufficient facts to entitle them to relief under this theory. In Straube v. Larson, supra, 287 Or at 361, the court stated:

> "* * * [T]o be entitled to go to a jury, plaintiff must not only prove that defendant intentionally interfered with his business relationship but also that defendant had a duty of non-interference, i.e., that he interfered for an improper purpose rather than for a legitimate one, or that defendant used improper means which resulted in injury to plaintiff. * * *"

In support of this claim for relief, plaintiffs allege only that the seizure of the Rocky B was "wrongful and illegal," as a result of which PCA "was forced to" foreclose its lien. We have already decided that defendants' seizure was authorized, and there is no allegation that defendants seized the vessel for the purpose of causing PCA to commence foreclosure proceedings. In the absence of an allegation that defendants sought to accomplish the seizure for other than a legitimate purpose, e.g., to enforce its lien pursuant to ORS 783.010,

defendants' motions for dismissal and summary judgment were properly granted.

The trial court did not err in granting the individual defendants' motion to dismiss or North Bend's motion for summary judgment.

Affirmed.

Appendix B

Denial of Petition for Review by Oregon Supreme Court

CA A25230
SC S30477

IN THE SUPREME COURT
OF THE STATE OF OREGON

ROCKY B FISHERIES INC
BROWN,JOHNNIE
BROWN,DAVID
Petitioners

v.

NORTH BEND FABRIC & MACHINE
DUDREY,JOHN
FREDRICKSON,FLOYD A
WIESENSEE,LLOYD W
MCCORD,PETER C
FOUNTAIN,JAY M
FINNERAN,LARENCE E
LESAN,JERRY O
JOHANSEN,KIRK
Respondents

ORDER DENYING REVIEW

IT IS HEREBY ORDERED that petitioner's petition for review is denied.

DATE: April 24, 1984.

/s/EDWIN J. PETERSON
CHIEF JUSTICE

Appendix C

Order of Coos County Circuit Court Judge Richard L. Barron sitting by designation in Multnomah County Circuit Court, dated June 14, 1982

No. A8110-06552

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

ROCKY B. FISHERIES, INC., an Oregon corporation; JOHNNY O. BROWN and DAVID BROWN,

Plaintiffs,

vs.

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation; JOHN DUDREY with his law firm partners, FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. McCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN,

Defendants.

ORDER ON MOTIONS TO
DISMISS/STRIKE AND
FOR SUMMARY JUDGMENT

The motions of defendants North Bend Fabrication & Machine, Inc., and defendants John Dudrey, et al., having come on regularly to be heard April 28, 1982,

before the Honorable Richard L. Barron, Judge of the Circuit Court of the State of Oregon for the County of Coos sitting in Multnomah County by designation, said motions being (1) by North Bend Fabrication for an Order granting summary judgment against portions of plaintiffs' complaint and (2) by defendants John Dudrey, et al., for an Order dismissing and/or striking portions of plaintiffs' complaint; plaintiffs appearing by Barbara J. Gazeley, of their attorneys, defendant North Bend Febrication appearing by Kent C. Whitaker, of its attorneys, and defendants John Dudrey, et al., appearing by Kenneth E. Roberts and John J. Fennerty, of their attorneys, and the court having examined the records, files and all of the memoranda submitted by the parties, and being fully advised,

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Defendant North Bend Fabrication & Machine, Inc. is granted summary judgment with respect to plaintiffs' Second, Third, Fourth and Fifth Claims for Relief.

2. Defendant North Bend Fabrication & Machine, Inc. is granted partial summary judgment with respect to subparagraphs: a, b, c, and e, of Paragraph X of plaintiffs' First Claim for Relief.

3. Defendant North Bend Fabrication & Machine, Inc.'s Motion for Summary Judgment is denied with respect to subparagraph d of Paragraph X of plaintiffs' First Claim for Relief.

4. Defendants' John Dudrey, et al., Motions to Dismiss/Strike are granted with respect to plaintiffs' Second, Third, Fourth, and Fifth Claims for Relief.

5. Defendants' John Dudrey, et al., Motions to Strike are granted with respect to subparagraphs: a, b, c and e, of Paragraph X of plaintiffs' First Claim for Relief.

6. Defendants' John Dudrey, et al., Motions to Strike are denied with respect to subparagraph d of Paragraph X of plaintiffs' First Claim for Relief.

IT IS FURTHER ORDERED that plaintiffs shall have twenty (20) days in which to further plead, and that subparagraph X (d) shall be segregated into a separate claim for relief, but that plaintiffs shall not have leave to replead any facts or issues relating to the constitutionality of ORS Chapter 783 or the constitutionality or propriety of the seizure instituted under Chapter 783, with the exception of the jurisdictional question raised under Paragraph X (d) of plaintiffs' First Claim for Relief.

DATED this 14th day of June, 1982.

/s/Richard L. Barron, JUDGE

APPENDIX D

Judgment of Coos County Circuit Court Judge Richard L. Barron sitting by designation in Multnomah County Circuit Court, dated June 14, 1982

No. A8110-06552

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

ROCKY B. FISHERIES, INC., an Oregon corporation; JOHNNY O. BROWN and DAVID BROWN,

Plaintiffs,

vs.

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation; JOHN DUDREY with his law firm partners, FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. McCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN,

Defendants.

JUDGMENT

Defendants North Bend Fabrication & Machine, Inc.'s Motion for Summary Judgment, defendants' John Dudrey, et al., Motions to Dismiss and Strike were granted with respect to plaintiffs' Second, Third, Fourth, and Fifth Claims for Relief, and with respect to subparagaphs a, b, c, and e of Paragraph X of Plaintiffs' First Claim for Relief pursuant to court order of June 14, 1982. A copy of the order granting defendants' motions is attached hereto as Appendix "A".

This court has expressly determined that because of the complexity of the case with respect to the multiple claims against the multiple defendants, final judgment on the essential legal issues decided by this court should be rendered forthwith in order to expedite the proceedings now before this court and minimize the prejudice to all the parties.

Pursuant to court order and by stipulation of all the parties, plaintiff filed an amended complaint which is identical to plaintiffs' complaint except that the allegation previously contained in subparagraph X (d) of the First Claim for Relief in plaintiffs' complaint was segregated into a separate claim, plaintiffs' sixth claim in plaintiffs' Amended Complaint would be subject to its previous order, and plaintiffs having consented thereto; now, therefore,

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to ORCP 67B and in the interests of judicial efficiency and in order to minimize the prejudice to all the parties, as well as to expedite and simplify the proceedings and to avoid the multiplicity of lawsuits, this court expressly determines that there is no just reason for delay, and that judgment is hereby rendered against plaintiffs and

in favor of all defendants as to plaintiffs' First, Second, Third, Fourth and Fifth Claims for Relief in plaintiffs Amended Complaint.

DATED this 14 day of June, 1982.

/s/Richard L. Barron, JUDGE

APPENDIX E

Notice of Appeal

No. A 25230

IN THE COURT OF APPEALS FOR THE STATE OF OREGON

ROCKY B. FISHERIES, INC., an Oregon corporation, JOHNNIE BROWN and DAVID BROWN,

Appellants,

v.

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation; JOHN DUDREY with his law firm partners FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. McCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN,

Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rocky B. Fisheries, Inc., an Oregon corporation, Johnnie Brown and David Brown, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State or Oregon, affirming the granting of the individual defendants' motion to dismiss and affirming the granting of North Bend's motion for summary judgment, entered in this action on January 25, 1984. The Oregon Court of Appeals was the highest court in which a decision could be had by virtue of the Oregon Supreme Court's denial of appellants' petition for review on April 24, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated this 20th day of June, 1984.

Respectfully submitted,

MARTIN, BISCHOFF, TEMPLETON,
BIGGS & ERICSSON

/s/ John L. Langslet
Attorneys for Appellants

(Certificate of Service)

APPENDIX F

Statutes Involved

Or. Rev. Stat. 783.010 to 783.170

783.010 Claims for which liens accorded. Every boat or vessel used in navigating the water of this state or constructed in this state is liable and subject to a lien:

(1) For wages due to persons employed, for work done or services rendered on board such boat or vessel.

(2) For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors or subcontractors of such owner, or with any person having them employed to construct, repair or launch such boat or vessel, on account of labor done or materials furnished by mechanics, tradesmen or others in the building, repairing, fitting and furnishing or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of premiums for insurance placed on or with respect to such boat or vessel, or on account of launchways constructed for the launching of such boat or vessel.

(3) For all sums for wharfage, anchorage or towage of such boat or vessel within this state.

(4) For all demands or damages accruing from the nonperformance or malperformance of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent or consignee of the boat or vessel on which such contract is to be performed, and for damages or injuries done to persons or property, by such boat or vessel, and for damages or injuries by such boat or vessel resulting in the death of any person.

783.020 Lien Priority. (1) The classes of claims specified in ORS 783.010 shall have priority according to the order in which they are enumerated.

(2) The liens under ORS 783.010 shall have precedence over all other liens and claims against such boat or vessel, except the following liens, claims and security interests, whether or not the following liens, claims or security interests have arisen or been perfected before or after liens under ORS 783.010:

(a) Liens and claims arising under those portions of the Ship Mortgage Act, 1920, that appear in sections 921 to 954 and 971 to 975 of title 46 of the United States Code.

(b) Security interests perfected under ORS chapter 79.

(c) Security interests on certificates of title perfected under ORS chapter 488.

783.030 Right to proceed against boat or vessel directly. Any person having a demand as mentioned in ORS

783.010, instead of proceeding for recovery thereof against the master, owner, agent or consignee of the boat or vessel, may at his option commence an action against such boat or vessel by name.

783.040 Complaint; jurisdiction and venue. Any person wishing to commence an action against a boat or vessel shall file his complaint against such boat or vessel by name with the clerk of the circuit court of the county in which the boat or vessel may lie or be. The complaint shall set forth the plaintiff's demand in all its particulars, and on whose account the same accrued, and shall be verified by the plaintiff or some credible person for him.

783.050 Issuance of warrant for seizure of boat or vessel. Whenever the complaint is filed, the clerk shall issue a warrant thereon, commanding the sheriff to seize the boat or vessel mentioned in the complaint, with her tackle, apparel, and furniture and retain the same until discharged from such custody by due course of law.

783.060 Procedure after return of warrant. Upon the return of any warrant issued as prescribed in ORS 783.050, proceeding shall be had in the circuit court against the boat or vessel seized, in the same manner as if the action had been commenced against the person on whose account the demand accrued.

783.070 Persons authorized to appear for boat or vessel; answer. The master, owner, agent or consignee of the boat or vessel may appear on behalf of the boat or vessel and answer the complaint.

783.080 Judgment by default; proceedings on issue of fact. If in any action commenced under ORS 783.030 and 783.040 the master, owner, agent or consignee does not appear and answer the complaint, the plaintiff may proceed to take judgment in the same manner and under the same restrictions as in a civil action against a natural person. If an issue of fact is joined, the same proceeding shall be had as in other actions.

783.090 Discharge of boat or vessel on giving of undertaking. If the master, owner, agent or consignee, before final judgment in any action commenced in pursuance of ORS 783.030 and 783.040, enters into an undertaking in favor of the plaintiff, with sufficient security, to be approved by the judge or clerk of the court in which the action is pending, conditioned to satisfy the amount which is adjudged due and owing to the plaintiff on determination of the action, together with all costs accruing, such boat or vessel, with its tackle, apparel and furniture, shall be discharged from further detention by the sheriff.

783.100 Retention of deposit; disposition of balance. If judgment is for the defendant, any deposit in lieu of an undertaking shall be returned to the person making the same; or if a balance remains after satisfying any judgment in favor of the plaintiff and costs of suit, the balance shall be so returned.

783.110 Order for sale on judgment. If judgment is rendered against any boat or vessel in favor of the

plaintiff, the court shall make an order directed to the sheriff, commanding him to sell the boat or vessel, together with its tackle, apparel and furniture, to satisfy the judgment and costs which may have accrued in the cause, which order shall be executed and returned in the same manner as other executions.

783.120 Judgment of undertaking; issuance of execution. If an undertaking with surety was given according to ORS 783.090 and judgment rendered in favor of the plaintiff, a judgment shall also be rendered upon the undertaking, and execution issued for the amount of judgment and costs in favor of the plaintiff, against the principal and security in such undertaking.

783.130 Bill of sale of boat or vessel; effect of previous liens. When any boat or vessel is sold in pursuance of ORS 783.110 to 783.160, the officer making the sale shall execute to the purchaser a bill of sale therefor, and such boat or vessel shall, in the hands of the purchaser and his assigns, be free and discharged from all previous liens and claims under this title.

783.140 Rights of other lien claimants. Any other person having or claiming a lien against any boat or vessel in pursuance of ORS 783.010 may, at any time after the sale upon execution and before payment over of any surplus in the hands of the sheriff, commence an action against such boat by name, as if the same had not been sold, and serve notice thereof upon the former master, owner, agent or consignee. While such action is pending, the sheriff shall not pay over any surplus that may be in his

hands to such master, owner, agent or consignee.

783.150 Distribution of proceeds of sale. In the distribution of the proceeds of sale, claims of a prior class shall be paid entire before any payment shall be made upon claims of a subsequent class. When the money to be applied to any class is insufficient to pay all the claims of that class, it shall be apportioned ratably among the claims of that class.

783.160 Sale of appurtenances for fractional share of boat or vessel. If it appears to the court in which the action is pending, or the judge thereof, that the liens against the boat or vessel can be satisfied by a sale of the tackle, apparel and furniture, or a part thereof, or a fractional share in such boat or vessel, the court or judge may modify the order of sale accordingly. If in pursuance of such order a sale is made of a fractional share in such boat or vessel, the purchaser shall hold such share jointly with the other owners.

783.170 Limitation of actions. All actions against a boat or vessel under ORS 783.010 to 783.160 shall be commenced within one year after the cause of action has accrued.

Or. Rev. Stat. 29.020 to 29.075
(now Or. R. Civ. P. 81-85)

29.020 Definitions for ORS 29.020 to

29.075. As used in ORS 29.020 to 29.075, unless the context requires otherwise:

(1) "Consumer goods" means consumer goods as defined in ORS 79.1090.

(2) "Consumer transaction" means a transaction in which the defendant obligates himself to pay for goods sold or leased, services rendered or moneys loaned, primarily for purposes of the defendant's personal, family or household use.

(3) "Issuing officer" means any person who on behalf of the court is authorized to issue provisional process.

(4) "Property" means a present or future legal or equitable, vested or contingent, interest in money, documents, instruments, accounts, chattel paper, general intangibles, contract rights, choses in action, goods or other real or personal property.

(5) "Provisional process" means attachment under ORS 29.110 to 29.400, garnishment under such attachment, replevin or claim and delivery under ORS 29.810 to 29.910 or any other legal or equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or to restrain use or disposition of, property in which the defendant claims an interest.

29.025 Requirements for issuance of provisional process. To obtain an order for issuance of provisional process the plaintiff shall file with the clerk

of the court from which such process is sought an affidavit or sworn petition requesting specific provisional process and showing, to the best knowledge, information and belief of the plaintiff:

(1) The name and residence or place of business of the defendant;

(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

(3) Description of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

(4) Whether the plaintiff's claim to provisional process is based upon ownership, entitlement to possession, a security interest or otherwise;

(5) A copy or verbatim recital of any writing or portion of a writing which evidences the origin or source of the plaintiff's claim to provisional process;

(6) Whether the claimed property is wrongfully detained by the defendant or another person;

(7) Whether the claimed property has been taken by public authority for a tax, assessment or fine;

(8) Whether the claimed property is held under execution, garnishment or other legal or equitable process or, if it is so held, either that the plaintiff has a superior right to provisional pro-

cess in the property or that the property is exempt from such execution, garnishment or process;

(9) If the plaintiff claims that the defendant has waived his right to be heard, a copy of the writing evidencing such waiver and a statement of when and in what manner the waiver occurred;

(10) If provisional process is based on notice of a bulk transfer under ORS chapter 76 or a similar statute or provision of law, a copy of the notice;

(11) Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state or transfer to an innocent purchaser;

(12) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

(13) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

(14) That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

29.030 Provisional process prohibited in certain consumer transactions. (1) Except under ORS 29.040, no court

shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction.

(2) In absence of finding described in subsection (2) of ORS 29.035 the court shall not order issuance of provisional process.

(3) In absence of specific application by the plaintiff the court shall not order issuance of provisional process.

29.035 Evidence admissable; choice of remedies available to court. (1) The court shall consider the affidavit or petition filed under ORS 29.025 and may consider other evidence, including, but not limited to, an affidavit, deposition, exhibit or oral testimony.

(2) If from the affidavit or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of provisional process, a restraining order or a show cause order. The finding under this subsection is subject to dissolution upon hearing.

29.040 Jurisdiction quasi in rem. Subject to ORS 29.030, where provisional process is sought to acquire quasi in rem jurisdiction of the defendant, if the court finds that the defendant neither resides in nor maintains an office or place of business in this state or that with use of reasonable diligence the defendant in the proceeding on the underlying claim cannot be served within

this state in a manner sufficient to effect in personam jurisdiction of the defendant, the court shall order issuance of provisional process.

29.045 Effect of notice of bulk transfer. Subject to ORS 29.030, if the court finds that with respect to property of the defendant notice of bulk transfer under ORS chapter 76 or a similar statute or provision of law has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.

29.050 Effect of waiver of right to notice and hearing. Subject to ORS 29.030, if the court finds:

(1) That the defendant, by conspicuous words in a writing executed by or on behalf of the defendant before filing of the affidavit or petition under ORS 29.025 or by handwriting of the defendant or the defendant's agent executed before filing of the affidavit or petition under ORS 29.025 has declared substantially that he is aware of his right to notice and hearing on the question of the probable validity of the underlying claim before he can be deprived of his property in his possession or control or in the possession or control of another and that he waives that right and agrees that the creditor, or one acting on behalf of the creditor, may employ provisional process to take possession or control of the property without first obtaining a final judgment or giving notice and opportunity for hearing on the probable validity of the underlying claim,

(2) That there is no reason to believe that the waiver or agreement is invalid, and

(3) That the defendant has voluntarily, intelligently and knowingly waived that right,

the court shall order issuance of provisional process in property to which the waiver and agreement apply.

29.055 Issuance of provisional process where damage to property threatened. Subject to ORS 29.030, if the court finds that before hearing on a show cause order the defendant or other person in possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, the court shall order issuance of provisional process in property which probably would be the subject of such destruction, harm, concealment, removal, transfer or violation.

29.060 Restraining order to protect property. Subject to ORS 29.030, where hearing on a show cause order is pending or where the court finds that because of impending injury, destruction, transfer, removal or concealment of the property in which provisional process is sought there is probable cause to believe that immediate and irreparable injury, damage or loss to the plaintiff is imminent, if an undertaking has been filed by

the plaintiff in accordance with ORS chapter 32, the court, in its discretion, may issue a temporary order directed to the defendant and each other person in possession or control of the claimed property restraining the defendant and each such other person from injuring, destroying, transferring, removing or otherwise disposing of property and requiring the defendant and each such other person to appear at a time and place fixed by the court and show cause why such restraint should not continue during pendency of the proceeding on the underlying claim.

29.065 Appearance; hearing; service of show cause order; content; effect of service on person in possession of property. (1) Subject to ORS 29.030, the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue.

(2) The show cause order issued under subsection (1) of this section shall be served personally on the defendant and on each other person to whom the order is directed.

(3) The order shall:

(a) State that the defendant may file affidavits with the court and may present testimony at the hearing; and

(b) State that if the defendant fails to appear at the hearing the court will order issuance of the specific provisional process sought.

(4) If at the time fixed for hearing the show cause order under subsection (1) of this section has not been served on the defendant but has been served on a person in possession or control of the property, the court may restrain the person so served from injuring, destroying, transferring, removing or concealing the property pending further order of the court.

29.070 Waiver; order without hearing. If after service of the order issued under subsection (1) of ORS 29.065 the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that he is aware that he has the right to be heard, that he does not want to be heard, that he expressly waives his right to be heard, that he understands that upon his signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to ORS 29.030, without hearing shall order issuance of provisional process.

29.075 Authority of court on sustaining validity of underlying claim. (1) Subject to ORS 29.030, if the court on hearing on a show cause order issued under ORS 29.065 finds that there is probable cause for sustaining the validity of the underlying claim, the court shall order issuance of provisional process.

(2) Subject to ORS 29.030, if the court on hearing on a show cause order issued under ORS 29.065 finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, the court in its discretion may continue or issue a restraining order.

Or. R. Civ. P. 83-84

PROVISIONAL PROCESS
RULE 83

A. **Requirements for issuance.** To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff or affiant, that the action is one in which provisional process may issue, and:

A.(1) The name and residence or place of business of the defendant;

A.(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

A.(3)(a) If the provisional process sought is claim and delivery, a descrip-

tion of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

A.(3)(b) If the provisional process sought is a restraining order, a statement of the particular acts sought to be restrained;

A.(4) Whether the plaintiff's claim to provisional process is based upon ownership, entitlement to possession, a security interest or otherwise;

A.(5) A copy or verbatim recital of any writing or portion of a writing, if plaintiff relies upon a writing, which evidences the origin or source of the plaintiff's claim to provisional process;

A.(6) Whether the claimed property is wrongfully detained by the defendant or another person;

A.(7) Whether the claimed property has been taken by public authority for a tax, assessment, or fine;

A.(8) If the plaintiff claims that the defendant has waived the right to be heard, a copy of the writing evidencing such waiver and a statement of when and in what manner the waiver occurred;

A.(9) If provisional process is based on notice of a bulk transfer under ORS chapter 76 or a similar statute or provision of law, a copy of the notice;

A.(10) Facts, if any, which tend to establish that there is a substantial

danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser.

A.(11) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

A.(12) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

A.(13) That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

B. **Provisional process prohibited in certain consumer transactions.** No court shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction. Provisional process authorized by Rule 85 may issue in consumer transactions.

C. **Evidence admissable; choice of remedies available to court.**

C.(1) The court shall consider the affidavit or petition filed under section A. of this rule and may consider other evidence including, but not limited to, an affidavit, deposition, exhibit, or oral testimony.

C.(2) If from the affidavit or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of provisional process, as provided in Section D. or E. of this rule, or a restraining order, as provided in section F. of this rule, in addition to a show cause order. The finding under this subsection is subject to dissolution upon hearing.

D. **Effect of notice of bulk transfer.** Subject to section B. of this rule, if the court finds that with respect to property of the defendant notice of bulk transfer under ORS chapter 76 or a similar statute or provision of law has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.

E. **Issuance of provisional process where damage to property threatened.** Subject to section B. of this rule, if the court finds that before hearing on a show cause order the defendant or other person in possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, and if Rule 82 A. has been complied with, the court shall order issuance of provisional process in property

which probably would be the subject of such destruction, harm, concealment, removal, transfer, or violation.

F. **Restraining order to protect property.** Subject to section B. of this rule, where hearing on a show cause order is pending or where the court finds that because of impending injury, destruction, transfer, removal, or concealment of the property in which provisional process is sought there is probable cause to believe that immediate and irreparable injury, damage, or loss to the plaintiff is imminent, and if Rule 82 A. has been complied with, the court in its discretion may issue a temporary order directed to the defendant and each other person in possession or control of the claimed property restraining the defendant and each such other person from injuring, destroying, transferring, removing, or otherwise disposing of property and requiring the defendant and each such other person to appear at a time and place fixed by the court and show cause why such restraint should not continue during pendency of the proceeding on the underlying claim. Such order shall conform to the requirements of Rule 79 D. A restraining order under this section does not create a lien.

G. **Appearance; hearing; service of show cause order; content; effect of service on person in possession of property.**

G.(1) Subject to section B. of this rule, the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for

hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue. Upon request of the plaintiff the hearing date may be set later than the seventh day.

G.(2) The show cause order issued under subsection (1) of this section shall be served on the defendant and on each other person to whom the order is directed.

G.(3) The order shall:

G.(3)(a) State that the defendant may file affidavits with the court and may present testimony at the hearing; and

G.(3)(b) State that if the defendant fails to appear at the hearing the court will order issuance of the specific provisional process sought.

G.(4) If at the time fixed for hearing the show cause order under subsection (1) of this section has not been served on the defendant but has been served on a person in possession or control of the property, and if Rule 82 A. has been complied with, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court or continue a temporary restraining order issued under section F. of this rule. Such order shall conform to the requirements of Rule 79 D. Any restraining order issued under this subsection does not create a lien.

H. **Waiver; order without hearing.**

If after service of the order issued under subsection G.(1) of this rule, the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to section B. of this rule without hearing shall order issuance of provisional process.

I. **Authority of court on sustaining validity of underlying claim; provisional process; restraining order.**

I.(1) Subject to section B. of this rule, if the court on hearing on a show cause order issued under section G. of this rule finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82 A. has been complied with, the court shall order issuance of provisional process. The order shall describe with particularity the provisional process which may be issued.

I.(2) Subject to section B. of this rule, if the court on hearing on a show cause order issued under section G. of this rule finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, and if Rule 82 A. has been complied with, the court in its discretion may continue or issue a restraining order of

the nature described in section F. of this rule. If a restraining order is issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.

ATTACHMENT
RULE 84

A. **Actions in which attachment allowed.**

A.(1) **Order for provisional process.** Before a writ of attachment may be issued or any property attached by any means provided by this rule, the plaintiff must obtain an order under Rule 83 that provisional process may issue.

A.(2) **Actions in which attachment allowed.** The plaintiff, at the time of issuing the summons or any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, in the following cases:

A.(2)(a) An action upon a contract, expressed or implied, for the direct payment of money, when the contract is not secured by mortgage, lien, or pledge, or when it is so secured but such security has been rendered nugatory by act of the defendant.

A.(2)(b) An action against a defendant not residing in this state to recover a sum of money as damages for breach of any contract, expressed or implied, other than a contract of marriage.

A.(2)(c) An action against a defen-

dant not residing in this state to recover a sum of money as damages for injury to property in this state.

A.(3) **Exception for bank.** Notwithstanding subsection (2) of this section, no attachment shall be issued against any bank or its property before final judgment as security for the satisfaction of any judgment that may be recovered against such bank.

B. **Property that may be attached.** Only the following kinds of property are subject to lien or levy before final judgment:

B.(1) In actions in circuit court, real property;

B.(2) Tangible personal property, including negotiable instruments and securities as defined in ORS 78.1020 except a certificate of an account or obligation or interest therein of a savings and loan institution;

B.(3) Debts; and

B.(4) The interest of a distributee of a decedent's estate.

C. **Attachment by claim of lien.**

C.(1) **Property subject to claim of lien.** When attachment is authorized, the plaintiff may attach the defendant's real property by filing a claim of lien.

C.(2) **Form of claim; filing.**

C.(2)(a) **Form.** The claim of lien must be signed by the plaintiff or plaintiff's attorney and must:

C.(2)(a)(i) Identify the action by

names of parties, court, docket number, and judgment demanded;

C.(2)(a)(ii) Describe the particular property attached in a manner sufficient to identify it;

C.(2)(a)(iii) Have a certified copy of the order authorizing the claim of lien attached to the claim of lien.

C.(2)(a)(iv) State that an attachment lien is claimed on the property.

C.(2)(b) **Filing.** A claim of attachment lien in real property shall be filed with the clerk of the court that authorized the claim and with the county clerk of the county in which the property is located. The county clerk shall certify upon every claim of lien so filed the time when it was received. Upon receiving the claim of lien, the county clerk shall immediately file such claim of lien in the county clerk's office, and record it in a book to be kept for that purpose. When the claim of lien is so filed for record, the lien in favor of the plaintiff attaches to the real property described in the claim of lien. Whenever such lien is discharged, the county clerk shall enter upon the margin of the page on which the claim of lien is recorded a minute of the discharge.

D. **Writ of attachment.**

D.(1) **Issuance; contents; to whom directed; issuance of several writs.** If directed by an order authorizing provisional process under Rule 83, the clerk shall issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the

defendant may be, and shall require the sheriff to attach and safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) **Manner of executing writ.** The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

D.(2)(a) **Personal property not in possession of third party.** Tangible personal property not in the possession of a third person shall be attached by taking it into the sheriff's custody. If any property attached is perishable, or livestock, where the cost of keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plaintiff's lien shall attach when the property is taken into the sheriff's custody.

D.(2)(b) **Other personal property.** Tangible and intangible personal property in the possession, control or custody of or debts or other monetary obligations owing by a third person shall be attached as provided in ORS 29.125 to 29.375.

D.(3) **Return of writ; inventory.** When the writ of attachment has been fully executed or discharged, the sheriff shall return the same, with the sheriff's proceedings indorsed thereon, to the clerk of the court where the action was commenced, and the sheriff shall make a full inventory of the property attached and return the same with the writ.

D.(4) **Indemnity to sheriff.** Whenever a writ of attachment is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff to file with the sheriff a surety bond, indemnifying the sheriff and the sheriff's bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

E. **Disposition of attached property after judgment.**

E.(1) **Judgment for plaintiff.** If judgment is recovered by the plaintiff against the defendant, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment, the court shall order the property to be sold to satisfy the plain-

tiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by the sheriff or the proceeds thereof, upon the execution, and if any such property or proceeds remain after satisfying such execution, the sheriff shall, upon demand, deliver the same to the defendant; or if the property attached has been released from attachment by reason of giving of the undertaking by the defendant, as provided by section F. of this rule, the court shall upon giving judgment against the defendant also give judgment in like manner and with like effect against the surety in such undertaking.

E.(2) **Judgment not for plaintiff.** If judgment is not recovered by the plaintiff, all the property attached, or the proceeds thereof, or the undertaking therefor, shall be returned to the defendant upon service upon the sheriff of a certified copy of the order discharging the attachment.

F. **Redelivery of attached property.**

F.(1) **Order and bond.** If an attachment deprives the defendant or any other person claiming the property of the possession or use of the property, the defendant or such person may obtain redelivery or possession thereof upon a court order authorizing such redelivery or possession. The moving party shall file a surety bond undertaking, in an amount fixed by the court, to pay the value of the property or the amount of plaintiff's claim, whichever is less, if the same is not returned to the sheriff upon entry of judgment against the defendant. A motion seeking an order author-

izing such redelivery or possession must state the moving party's claim of the value of the attached property and must be served upon plaintiff as provided in Rule 9 at least five days prior to any hearing on such motion, unless the court orders otherwise. The property shall be released to the defendant upon the filing of the bond.

F.(2) **Defense of surety.** In an action brought upon such undertaking against the principal or the sureties, it shall be a defense that the property for which the undertaking was given did not, at the execution of the writ of attachment, belong to the defendant against whom the writ was issued.